RECORD AND BRIEFS

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No. 15-513

IN THE
Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA EX REL.
CORI RIGSBY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR *AMICUS CURIAE* THE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF FOR *AMICUS CURIAE* THE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER

The American Tort Reform Association respectfully submits this brief as *amicus curiae* in support of petitioner.[1]

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any person other than *amicus curiae*, its members, and its counsel made any monetary contribution intended to fund the brief's preparation or submission. The parties were notified of *amicus curiae*'s intent to file this brief at least 10 days before it was due, and the parties have consented to its filing. The parties' consent letters have been lodged with the Clerk.

INTEREST OF *AMICUS CURIAE*

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before this Court and other federal and state courts addressing important liability issues. *See, e.g.*, *Am. Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527 (2011); *Williamson* v. *Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011).

Qui tam litigation under the False Claims Act (FCA) has been on a dramatic rise for the past decade. Indeed, while the United States itself has filed fewer than 100 cases in each of the last two years, *qui tam* relators have filed more than seven times as many—754 in 2013 and 713 in 2014. *See* U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1987-Sept. 30, 2014*, at 2 (2015).[2] ATRA has a significant interest in ensuring that *qui tam* actions are conducted in a manner fair to all parties, including defendants.

The two issues involved in this case—whether there is any consequence for a *qui tam* relator who violates the statutory seal requirement, and what the governing scienter standard is—are issues with relevance to every one of the hundreds of *qui tam* cases filed each year. As for the first, every *qui tam* relator must decide whether to wait for the seal to be lifted before seeking media attention for their suit.

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[2] *Available at* http://goo.gl/O2e83f.

Here, the relators and their counsel opted—while their case was under seal—to stage an extensive and relentless media campaign involving the *New York Times*, ABC's *20/20*, and a Congressman (among other disclosures). Such willful and repeated violations of the FCA's seal requirement, which the Fifth Circuit found were in "bad faith" and which the relators "conceded" had occurred, Pet. App. 22a-23a, result in precisely the sort of fundamental unfairness that ATRA opposes; before a defendant is statutorily permitted to see a complaint that has been filed against it or otherwise know the precise content of the accusations of fraud it faces, a financially motivated relator takes to the public airwaves to leverage government and public interest in the relator's allegations.

The second issue—whether a corporate defendant can be found to satisfy the FCA's "knowing[]" scienter requirement based on the collective knowledge of multiple employees, even if no employee who investigated the claim or signed off on its submission had sufficient knowledge to satisfy that requirement—is likewise a recurring issue in FCA investigations and cases. 31 U.S.C. § 3729(a)(1)(A)-(B). And it is a concern that cuts across all industries. The Fifth Circuit's decision, if allowed to stand, opens the door for relators (and the United States) to seek to impose draconian FCA liability based on a scienter theory pieced together from various employees and managers, even though no one connected to the actual submission of the claims considered there to be any impropriety about the request for payment. This issue, too, goes to the heart of whether our civil justice system operates in a fair manner and is of

grave concern to ATRA's members and defendants generally.

SUMMARY OF ARGUMENT

The petition for certiorari in this matter raises two questions of significant importance under the FCA. The first involves the consequences for a relator who violates the FCA's seal requirement—the requirement that her complaint "remain under seal for at least 60 days." 31 U.S.C. § 3730(b)(2). In this case, the relators willfully and repeatedly violated this requirement by conducting an extensive media campaign to publicize their FCA suit. Pet. App. 21a. The Fifth Circuit nevertheless held that their suit could proceed, without even considering whether the violation had unfairly prejudiced the defendant, State Farm Fire and Casualty Co.

That decision deepens an acknowledged circuit split, and this case is an ideal vehicle for resolving it. Moreover, the decision below is wrong. Because the relator does not become an assignee of the Government's damages claim unless the seal requirement is obeyed, a seal violation should result in automatic dismissal of the relator's suit—as the Sixth Circuit has held. At the very least, in deciding whether dismissal is appropriate, a court should consider whether the defendant was harmed—as the Second and the Fourth Circuits have held. If allowed to stand, the decision below would make the civil justice system less fair for the hundreds of defendants facing *qui tam* suits each year.

The second question in the petition also warrants this Court's review. To prevail under the FCA, a plaintiff must show that the defendant acted "knowingly" in submitting a false claim. 31 U.S.C.

§ 3729(a)(1)(A)-(B). The Fifth Circuit allowed the plaintiffs here to prove the requisite scienter by relying on the collective knowledge of State Farm's employees. The circuits, however, are split over whether the FCA permits such reliance. And if allowed to stand, the decision below would mean that defendants could face draconian FCA liability even when no single employee knew of the wrongful conduct. That result—which would require America's businesses to go to extraordinary lengths to comply with the statute—cannot be squared with the FCA's text or purpose.

The petition for certiorari should be granted.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHEN A VIOLATION OF THE SEAL REQUIREMENT JUSTIFIES DISMISSAL OF A FALSE CLAIMS ACT SUIT.

The first question presented asks when a relator's FCA action should be dismissed for violation of the seal requirement. Because that question satisfies every criterion for review, certiorari should be granted.

1. To begin, the question presented is the subject of a square circuit split. The Sixth Circuit has held that a relator's FCA claim must *always* be dismissed when the relator violates the FCA's seal requirement. *See United States ex rel. Summers* v. *LHC Grp., Inc.*, 623 F.3d 287, 296 (6th Cir. 2010). Other circuits, by contrast, have rejected a *per se* rule, holding that whether dismissal is appropriate should instead be determined case by case according to a balancing of the relevant interests. *See* Pet. App.

21a-23a; *Smith* v. *Clark/Smoot/Russell*, 796 F.3d 424, 430 (4th Cir. 2015); *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 67 F.3d 242, 245-247 (9th Cir. 1995); *United States ex rel. Pilon* v. *Martin Marietta Corp.*, 60 F.3d 995, 998-999 (2d Cir. 1995).

Even among those circuits that have adopted a balancing test, there is disagreement. The Fifth and the Ninth Circuits have held that the only factors that should be considered in the balance are: (1) the harm to the Government from the violation; (2) the nature of the violation; and (3) whether the violation was made willfully or in bad faith. *See Lujan*, 67 F.3d at 245-246; Pet. App. 19a-20a. Neither circuit accounts for the interests of defendants; in the words of the Ninth Circuit, "protecting the rights of defendants is not an appropriate consideration when evaluating the appropriate sanction for a violation of the seal provision." *Lujan*, 67 F.3d at 247; *see also* Pet. App. 20a ("embrac[ing] the *Lujan* test"). The Second and the Fourth Circuits, by contrast, do weigh defendants' interests. *See Smith*, 796 F.3d at 430; *Pilon*, 60 F.3d at 999. Those circuits—unlike the Fifth and the Ninth—recognize that one of the purposes of the FCA's seal provision is "to protect the reputation of a defendant." *Smith*, 796 F.3d at 430 (internal quotation marks omitted); *see also Pilon*, 60 F.3d at 999.

2. Moreover, the question presented is ripe for this Court's review. The split among the courts of appeals has been acknowledged by various circuits as well as by the United States. *See* Pet. App. 19a; *Summers*, 623 F.3d at 296; *Smith*, 796 F.3d at 430 n.2; Br. for the United States as *Amicus Curiae* 15-17, *United States ex rel. Summers* v. *LHC Grp., Inc.*, No. 10-827 (U.S. May 26, 2011) [hereinafter

U.S. *Summers* Br.]. In fact, the United States has stated that the split "warrants resolution by this Court." U.S. *Summers* Br. 7. When invited to express its views on the petition for certiorari in *Summers*, the United States recommended denial only because it believed that case to be an "unsuitable vehicle": According to the Government, the relator's complaint was "subject to dismissal on an alternative jurisdictional ground"—namely, that its allegations of fraud were "similar" to those made in an earlier-filed suit. *Id.* at 18-19; *see also* 31 U.S.C. § 3730(b)(5). There is no such independent ground for dismissal in this case. *See* Pet. App. 23a-31a (rejecting a challenge to the District Court's jurisdiction). Because this Court's resolution of the question presented would be outcome-determinative, this case is an ideal vehicle for review. There would be no point in awaiting a future petition.

Nor would there be any point in awaiting further percolation in the lower courts. The FCA's venue provision is broad: A relator may bring suit "in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred." 31 U.S.C. § 3732(a). In many cases, relators will have a choice of forum, and will simply elect to bring suit in the Fifth and the Ninth Circuits, where they know their suit will not be dismissed, even if they violate the FCA's seal provision, and even if those violations unduly prejudice defendants. Given the incentive to forum-shop, this circuit split is unlikely to go away on its own. The time is now for this Court to decide the question presented.

3. There is another reason this Court should intervene now: On the merits, the decision below is wrong, and serves only to expose FCA defendants to unfair prejudice.

a. The FCA protects the United States from fraud. It imposes civil liability on "any person who * * * knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A)-(B). Thus, as this Court has explained, what the FCA seeks to remedy is "injury to the United States." *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000).

Under the FCA, however, the Federal Government is not the only party that can seek damages against the alleged false claimant. The FCA also authorizes a private person (*i.e.*, a relator) to seek damages "for the person and for the United States Government" by bringing a *qui tam* action "in the name of the Government." 31 U.S.C. § 3730(b)(1). As this Court has recognized, relators have different motivations from the Government in bringing suit. *See Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good."). Given the extremely lucrative damages and penalties available under the FCA (to say nothing of its fee-shifting provision), a relator's claims will often be motivated by "opportunism rather than legitimate whistle-blowing." *Sanderson* v. *HCA-The Healthcare Co.*, 447 F.3d 873, 876 (6th Cir. 2006).

Nevertheless, in *Stevens*, this Court held that a private person has Article III standing to bring such an action. As the Court explained, even though the relator herself has suffered no injury, "[t]he FCA can reasonably be regarded as effecting a *partial assignment* of the Government's damages claim." *Stevens*, 529 U.S. at 773 (emphasis added). Because "the assignee of a claim has standing to assert the injury in fact suffered by the assignor," *id.*, the Court concluded that "the United States' injury in fact suffices to confer standing" on the relator to sue, *id.* at 774. Under *Stevens*, therefore, a relator has Article III standing only insofar as she is "suing as a partial assignee of the United States." *Id.* at 773 n.4 (emphasis omitted).

The question, then, is under what circumstances the FCA can be understood to effect such a partial assignment. Section 3730(b)(2) provides the answer. That section provides that the relator's complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2). Each of these provisions—including the seal provision—is naturally understood as imposing a condition on assignment. Only when a relator satisfies all of these conditions does the FCA effect a partial assignment of the Government's damages claim. *See Summers*, 623 F.3d at 299 ("[W]ithout meeting those conditions, a False Claims Act plaintiff has no more right to bring suit in the Government's name than any other private person."). By the same token, when a relator fails to satisfy any one of the conditions, no assignment is effected. And in the absence of any assignment, the relator has no Article III standing to proceed; her suit must be

dismissed. *See id.* at 298 ("An FCA plaintiff who cannot satisfy those conditions * * * cannot bring suit in the name of the Government and has no basis for recovery.").

The decision below was therefore wrong to hold that "a seal violation does not automatically mandate dismissal." Pet. App. 20a. Because a seal violation prevents the relator from becoming an assignee in the first place, dismissal is *always* required when a relator commits a seal violation. It is true, as the Fifth Circuit noted, that the text of the FCA does not expressly say that a *qui tam* action should be dismissed when a relator violates the seal. *Id.* But that is of no moment, because absent assignment, a relator, who has suffered no injury herself, lacks Article III standing to pursue the action. The Fifth Circuit also suggested that a categorical rule would "frustrate" the FCA's purposes by requiring dismissal even "when the government suffers minimal or no harm from the violation." *Id.* But "no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). And here, Congress was no doubt "aware of the various policy interests that might be affected by an *in camera* requirement, and chose a sixty-day requirement accordingly." *Summers*, 623 F.3d at 297. Courts should not "second-guess" the balance that Congress struck in making that requirement a condition of assignment. *Id.* at 299. And because no relator has standing unless she fulfills every one of those conditions, the Fifth Circuit erred in rejecting a categorical rule requiring dismissal of a relator's

complaint in every case in which a relator breaks the seal.[3]

b. Even if dismissal is not required in every case, the decision below should still be reversed. That is because, unlike the Second and the Fourth Circuits, the Fifth Circuit applies a balancing test that disregards defendants' interests altogether.

In enacting the seal requirement, Congress intended to "protect the Government's interest in criminal matters" by, among other things, preventing the filing of a *qui tam* action from tipping off the subjects of an ongoing criminal investigation. S. Rep. No. 99-345, at 24 (1986). At the same time, the seal requirement was not supposed to give relators any litigation advantage over defendants. The Senate Report made that much clear: "By providing for sealed complaints, the Committee does not intend to affect defendants' rights in any way." *Id.* Indeed, Congress did not intend the seal requirement to unfairly prejudice anyone; in the words of the Senate Report, the requirement was meant to "protect[] both the Government and the defendant's interests without harming those of the private relator." *Id.*

To serve Congress's purposes, therefore, any balancing test should account for the defendant's interests as well as the Government's. When a relator violates the seal, a court should consider whether that violation has "affect[ed] defendants' rights in

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[3] Because dismissal of a relator's suit is with prejudice only as to the relator and not as to the United States, dismissal of that suit would not affect the United States' ability to pursue a valid claim itself. Only the relator would lose her right to participate and claim a portion of any recovery.

any way." *Id.* A seal violation could harm defendants in any number of ways. For example, when a relator reveals prematurely that "the defendant is named in a fraud action brought in the name of the United States," that information risks misinforming the public about the nature of the suit. *Smith*, 796 F.3d at 430 (internal quotation marks omitted). At that point in time, "the United States has not yet decided whether to intervene," and so the public may be misled to believe that the defendant is the target of a suit by the Federal Government. *Id.* (internal quotation marks omitted).

A seal violation could also harm defendants by presenting the public with a biased, one-sided view of the case, seen through the financially motivated relator's eyes. By breaking the seal, relators are often able to "expos[e] a defendant to immediate and hostile media coverage." *Summers*, 623 F.3d at 298. And because the seal itself prevents the defendant from learning the precise allegations of the complaint, the defendant is often in a poor position to respond. The public is left with a negative impression of the defendant, even when the defendant has done nothing wrong. That reputational blow might give a relator enough "leverage to demand that [the] defendant come to terms quickly." *Id.* It might also cause long-lasting damage to the defendant's operations, stigmatizing its business in the eyes of the public for years to come. *See Erickson ex rel. United States* v. *Am. Inst. of Biological Scis.*, 716 F. Supp. 908, 912 (E.D. Va. 1989) (discussing the need "to protect the defendant's reputation from unfounded public accusations").

The test embraced by the decision below ignores defendants' interests altogether—and thus encour-

ages relators to ignore them, too. Relators are already motivated to violate the seal, if only to attract enough media attention to get the United States interested in the case; from 1987 to 2014, only 3.5 percent of the total amount the Federal Government has recovered under the FCA has come from *qui tam* cases in which the Government declined to intervene. *See* U.S. Dep't of Justice, *supra*, at 2. If allowed to stand, the decision below will give relators an added reason to violate the seal: to gain an unfair advantage over FCA defendants. Only by weighing defendants' interests in the balance can courts guard against that incentive. And when a seal violation "affect[s]" those interests "in any way," S. Rep. No. 99-345, at 24, courts should simply dismiss the relator's complaint. Because the Fifth Circuit erred in deciding an important question over which the circuits are divided, certiorari should be granted.

II. THIS COURT SHOULD ALSO GRANT REVIEW TO DECIDE WHETHER THE "COLLECTIVE KNOWLEDGE" DOCTRINE APPLIES UNDER THE FALSE CLAIMS ACT.

The second question presented asks whether a plaintiff can prove corporate scienter under the FCA by relying on the collective knowledge of multiple employees. This question, too, merits review by this Court.

1. To prevail on an FCA claim, a plaintiff must prove that the defendant acted with the requisite scienter: that the defendant "knowingly" submitted (or caused to be submitted) a false claim (or false statement material to a false claim) to the Government for payment. 31 U.S.C. § 3729(a)(1)(A)-(B).

Under the so-called "collective knowledge" doctrine, a plaintiff suing a corporation would be relieved of proving that any individual employee "knew all the facts that made [the claim] false." *United States ex rel. Harrison* v. *Westinghouse Savannah River Co.*, 352 F.3d 908, 919 n.9 (4th Cir. 2003). Rather, a plaintiff would be allowed "to prove scienter by piecing together scraps of 'innocent' knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing in connection with a claim seeking government funds." *Id.*

The courts of appeals are divided over whether plaintiffs may rely on the "collective knowledge" doctrine to prove scienter under the FCA. The D.C. Circuit has held that they may not. In *United States* v. *Science Applications International Corp.*, 626 F.3d 1257 (D.C. Cir. 2010) (*SAIC*), that court held that "under the FCA, 'collective knowledge' provides an inappropriate basis for proof of scienter because it effectively imposes liability, complete with treble damages and substantial civil penalties, for a type of loose constructive knowledge that is inconsistent with the Act's language, structure, and purpose." *Id.* at 1274. The Fourth Circuit has likewise "recognized the theory's troubling implications for FCA liability." *Id.* at 1275. In *Harrison*, it did not adopt the "collective knowledge" doctrine described above, and declined to "cobbl[e] together pieces of 'innocent' knowledge to find the requisite scienter." 352 F.3d at 919 n.9.

The decision below, by contrast, embraced the doctrine. In this case, there were two sets of relevant State Farm employees: (1) the adjusters, including Cody Perry and supervisor John Conser, who were

specifically assigned to the McIntosh flood claim; and (2) Alexis "Lecky" King, a supervisor who was not involved in the McIntosh claim and who allegedly advised adjusters in general to presume flood damage. Pet. App. 4a-6a. Only the adjusters knew the facts of what happened to the McIntosh home; they were the only ones who actually inspected the home and reviewed the McIntosh claim. *Id.* at 5a-6a. And in their view, the claim of flood damage was legitimate. *Id.* at 36a-37a. King, on the other hand, became aware of the facts specific to the McIntosh home only *after* the claim had already been submitted. *Id.* at 38a. Thus, at the time of submission, no individual State Farm employee "knew of [any] wrongful conduct." *Harrison*, 352 F.3d at 918 n.9. King advocated a presumption of flood damage, but did not know any of the facts specific to the McIntosh home; the adjusters did know those facts, but did not think they made the claim false. Only by imputing the adjusters' supposed factual knowledge to supervisors like King could the Fifth Circuit conclude that State Farm had the requisite scienter. Pet. App. 38a-39a.

2. This Court should grant certiorari to resolve this split and reverse the Fifth Circuit. The FCA defines "knowingly" to encompass "actual knowledge of the information," as well as "deliberate ignorance" or "reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b). Mere negligence is not enough. *See* S. Rep. No. 99-345, at 7 ("The Committee is firm in its intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence."). Thus, to determine whether a corporate defendant acted with scienter, courts should look to the state of mind of the individ-

ual corporate officials or employees who actually handled and submitted the allegedly false claim, rather than generally to the collective knowledge of all the corporation's officers and employees.

But when courts apply a "collective knowledge" doctrine, a defendant could be found to have the requisite scienter simply because it failed to "cobbl[e] together pieces of 'innocent' knowledge" held by different employees. *Harrison*, 352 F.3d at 919 n.9. And that is so even when that "communication failure" is the result of mere negligence or even an honest mistake. *SAIC*, 626 F.3d at 1275. The "collective knowledge" doctrine cannot be squared with the text of the FCA.

Indeed, the doctrine would impose on corporations precisely the sort of "burdensome obligation" that Congress sought to avoid. S. Rep. No. 99-345, at 21. After all, the doctrine would impute to the corporation the knowledge of not only its officers but also its "potentially thousands of ordinary employees." *SAIC*, 626 F.3d at 1275. And it would force the corporation to ensure that all of those potentially thousands of people were in constant communication with each other, just in case an innocent fact known by one of them, when combined with one or more innocent facts known by others, established that a claim was false. America's businesses already devote substantial resources toward preventing fraud. But they would have to devote far greater resources toward internal compliance if the "collective knowledge" doctrine applied under the FCA. Because that doctrine is contrary to both the FCA's text and its purpose, this Court should grant certiorari to reverse the decision below.

CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted.

Respectfully submitted,

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